Office-Supreme Court, U.S.
FILED
MAY 29 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1669

In the Supreme Court of the United States

OCTOBER TERM, 1984

ST. MARYS HOSPITAL MEDICAL CENTER, PETITIONER

v.

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

8/7P

TABLE OF AUTHORITIES

Page

Cases:

Alvestad v. *Monsanto Co.*, 671 F.2d 908, cert. denied, 459 U.S. 1070 5

Fassler v. *Moran*, 576 F.2d 1372 5

Foman v. *Davis*, 371 U.S. 178 5

Hahn v. *Becker*, 551 F.2d 741 4

Surowitz v. *Hilton Hotels Corp.*, 383 U.S. 363 5

Thompson v. *Immigration and Naturalization Service*, 375 U.S. 384 ..... 2, 3, 4, 5

Wolfsohn v. *Hankin*, 376 U.S. 203 4

Rules:

Fed. R. App. P. 4(a)(1) 2

Fed. R. Civ. P. :

Rule 6(b) 4

Rule 50(b) 4

Rule 52(b) 1, 2, 4

Rule 59(e) 2, 4

Miscellaneous:

9 J. Moore, *Federal Practice* (1985) 6

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1669

ST. MARYS HOSPITAL MEDICAL CENTER, PETITIONER

v.

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner seeks review of the court of appeals' holding that it had jurisdiction over the government's appeal, where the government's notice of appeal was timely filed if measured from the date of the denial of a post-judgment motion that was timely filed, but not served.

1. Petitioner filed this action in the United States District Court for the Western District of Wisconsin, challenging the Secretary's method of apportioning petitioner's laboratory costs between Medicare and non-Medicare patients. By judgment entered December 30, 1983, the district court held for petitioner and remanded the case for further proceedings (Pet. App. 1a, 4a).

On January 9, 1984, the tenth day following judgment, the government filed a motion, styled as a motion under Fed. R. Civ. P. 52(b), requesting the district court to reconsider its holding (Pet. App. 4a, 6a). As a result of an error,

this motion was not served on counsel for petitioner (*ibid.*). Despite the lack of a certificate of service, the district court reviewed the motion and denied it on the merits (*id.* at 25a-29a). Counsel for petitioner then sent a letter to the district court thanking it for its decision denying reconsideration and informing the judge that counsel for petitioner had been unaware of the "request for reconsideration as we were never furnished a copy of the Secretary's motion" (*id.* at 7a n.8). The government filed its notice of appeal 76 days after entry of the original judgment and 59 days after denial of its post-judgment motion. Thus, the notice of appeal was timely if measured from the denial of the post-judgment motion, but untimely if measured from the entry of the original judgment. See Fed. R. App. P. 4(a)(1).

On appeal, petitioner contended that the government's notice of appeal was untimely, since the post-judgment motion was not "served [within] ten days after entry of judgment" as required by Fed. R. Civ. P. 59(e). The court of appeals assumed that the motion should be viewed as a Rule 59(e) motion rather than a Rule 52(b) motion. It nevertheless rejected petitioner's claim and held, in reliance on *Thompson* v. *Immigration and Naturalization Service*, 375 U.S. 384 (1964), that it had jurisdiction over the appeal (Pet. App. 6a-7a).[1] The court of appeals stated that a "post-judgment motion was filed that would have been timely had it been served"; the "notice of appeal also would have been

---

[1]In *Thompson*, this Court upheld a late-filed notice of appeal where strict application of the federal rules would have barred the appeal. The petitioner had filed certain post-trial motions 12 days after judgment. Opposing counsel raised no timeliness objection and the district court stated that the motions were made "in ample time." 375 U.S. at 384. After denial of the motions, petitioner filed a notice of appeal, within 60 days of denial of the motions but not within 60 days of the original entry of judgment (*ibid.*). The court of appeals held that it had no jurisdiction to hear the appeal, but this Court reversed. Noting that "if any question had been raised about timeliness of the motions [before the district

timely had the post-judgment motion tolled the appeals period"; and the "opposing party took no formal action cognizable by the court to oppose the * * * motion" (*ibid.*). Although the district court in *Thompson* "explicitly informed the moving party that its motion for a new trial was timely," the court below held that such "explicit assurance is unnecessary" where "the district court gave the moving party implicit assurance that [the] motion was timely by considering it without mentioning any timeliness problem, and opposing counsel failed to raise the issue" (Pet. App. 7a). The court further stated that "[i]f [petitioner] wished to object to timeliness, it should have raised that objection within sixty days of entry of the judgment, while [the government] still had an opportunity either to file a notice of appeal or to request an extension of time in which to file an appeal" (*id.* at 8a).[2]

2. The decision of the court of appeals is correct. All that the court of appeals held is that, where a party files a timely post-judgment motion, the district court acts on the motion, and no party raises a timeliness objection, the time

---

court], petitioner * * * presumably would have filed the appeal within 60 days of the entry of the original judgment," this Court held:

> Here * * * petitioner did an act which, if properly done, postponed the deadline for the filing of his appeal. Here * * * the District Court concluded that the act had been properly done. Here * * * the petitioner relied on the statement of the District Court and filed the appeal within the assumedly new deadline but beyond the old deadline. Accordingly, in view of these "unique circumstances," * * * we grant the writ of certiorari, vacate the judgment and remand the case to the Court of Appeals so that petitioner's case may be heard on the merits.

375 U.S. at 387.

[2]Having concluded that it had jurisdiction to hear the appeal, the court of appeals reversed on the merits, holding that substantial evidence supported the Secretary's apportionment of laboratory costs (Pet. App. 8a-23a). Petitioner does not challenge this ruling in its petition.

to file a notice of appeal runs from the date of denial of the post-judgment motion, even though the motion was not timely served. This narrow decision does not conflict with any decision of this Court or any other court of appeals. Therefore, review by this Court is not warranted.

As the court of appeals concluded, this case is fully consistent with *Thompson*.[3] The government's post-trial motion was timely filed but concededly not served within 10 days as required by Fed. R. Civ. P. 59(e).[4] It was "an act, which if properly done, [would have] postponed the deadline for the filing of [the] appeal." 375 U.S. at 387. Furthermore, the government justifiably relied upon the district court's prompt ruling on its motion and the total absence of any timeliness objection by petitioner as indicative that the motion was, indeed, timely. If petitioner had raised an objection before the district court, the government would have had time to file its appeal within 60 days of the original judgment or to obtain an extension. Additionally, the lack of service in no way prejudiced petitioner since the district

---

[3]The court of appeals' decision is also consistent with *Wolfsohn* v. *Hankin*, 376 U.S. 203 (1964). In *Wolfsohn*, this Court summarily reversed the dismissal of an appeal where the petitioner, in contravention of Fed. R. Civ. P. 6(b), which explicitly states that a district court "may not extend the time" for moving for a new trial under Rule 59(e), obtained an extension of time to file a motion fora new trial. Following denial of the motion, the petitioner filed a notice of appeal, which was timely if measured from entry of the order denying the new trial.

[4]As noted above, the government originally styled its motion as falling under Fed. R. Civ. P. 52(b). In contrast to Rule 59(e)'s requirement that the motion be "served" within 10 days, Rule 52(b) states only that the motion must be "made" within 10 days. There is authority that a motion under Rule 50(b) (which, like Rule 52(b), states that a party may "move" within 10 days) is timely if filed within 10 days, although not served within that time. *Hahn* v. *Becker*, 551 F.2d 741, 744 (7th Cir. 1977). The government argued below that the rule applied in *Hahn* ought to apply under Rule 52(b), and hence in this case. In light of its ruling on the *Thompson* issue, the court of appeals declined to reach this issue (Pet. App. 6a n.7).

court denied the motion. Under these circumstances, the court of appeals' holding that the notice of appeal was timely filed is in keeping with the spirit of the Federal Rules "to administer justice through fair trials, [rather than] through summary dismissals" based upon "procedural booby traps." *Surowitz* v. *Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966). See also *Foman* v. *Davis*, 371 U.S. 178, 181 (1962) (the "spirit of the federal rules" favors "decisions on the merits" rather than decisions based upon "mere technicalities.").[5]

Nor is there any conflict in the circuits. Petitioner contends (Pet. 6-9) that the court of appeals' decision conflicts with *Alvestad* v. *Monsanto Co.*, 671 F.2d 908 (5th Cir.), cert. denied, 459 U.S. 1070 (1982), and *Fassler* v. *Moran*, 576 F.2d 1372 (9th Cir. 1978) (per curiam). Both of these cases are distinguishable because in neither case was the post-judgment motion at issue timely filed. In *Alvestad,* it was filed 21 days after entry of judgment (671 F.2d at 910) and, in *Fassler,* it was filed 19 days after entry of judgment (576 F.2d at 1373). In this case, in contrast, the post-

---

[5]Petitioner contends that the court of appeals erred by not distinguishing this case from *Thompson*, since in that case the district court stated that the motion was timely. But the court below was surely correct in concluding that an explicit assurance of timeliness is unnecessary where, as in this case, "the district court gave the moving party implicit assurance that [its] motion was timely" (Pet. App. 7a). Here, the district court denied the government's motion for reconsideration promptly, in a written opinion (*id.* at 25a-29a). Moreover, although petitioner objected that it had not been served with the post-judgment motion, it never suggested that the motion was untimely.

judgment motion was timely filed but not timely served.[6] There is no need for the Court to consider the peculiar factual situation presented by this case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

MAY 1985

---

[6]Each of the court of appeals decisions cited by petitioner without discussion (Pet. 8) is distinguishable for the same reason. In addition, the excerpt from Professor Moore's treatise relied upon by petitioner (Pet. 8-9) is similarly distinguishable, because it refers to a situation where a post-judgment motion is filed prior to the running of the time to appeal rather than within 10 days. More pertinent to this case is the following excerpt from that treatise:

> Post-trial motions are designed to give the trial court an opportunity to correct errors so as to avoid a needless appeal. * * * [I]t would be reasonable to hold that so long as the motion was initiated within 10 days by either serving it or filing it within that time, and the other step followed closely, the motion has been "made" or the party has "moved" in time. After all, there are steps other than service and filing that may be required to ready the motion for hearing the failure to accomplish which are not treated in so draconian a fashion.

9 J. Moore, *Federal Practice* ¶ 204.12(2), at 4-79 to 4-80 n.28 (1985).

DOJ-1985-05